FILED
Supreme Court, U. S.
OCT 16 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-433

DONALD C. CHRISTMAN,

Petitioner,

vs.

EDWARD V. HANRAHAN, ANTHONY CORSENTINO, MARSHALL WEINBERG, WILLIAM MILLER, AND JOSEPH DILEONARDI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions	3
Statement of the Case	4
Reason for Granting the Writ	7
Conclusion	13
Appendix A	A1
Appendix B	A7

AUTHORITIES CITED

Cases

Barker v. Wingo, 407 U.S. 514	9
Basista v. Weir, 340 F.2d 74 (3rd Cir. 1965)	11
Brady v. Maryland, 373 U.S. 83	7, 8
Duncan v. Nelson, 466 F.2d 939 (7th Cir. 1972)	10, 11
Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972), cert. den. U.S. Sup.Ct. Doc. No. 72-339, Nov. 20, 1972	10
Kerr v. City of Chicago, 424 F.2d 1134, 1141 (7th Cir. 1970)	11
Klopfer v. North Carolina, 386 U.S. 213, 222	9
Mooney v. Holohan, 294 U.S. 103 (1934)	8
People v. Toomin, 18 Ill. App. 3d 824, 310 N.E. 2d 767 (1974)	12
Smith v. Hooey, 393 U.S. 374, 379	9
United States v. Ewell, 383 U.S. 116, 120	9
United States v. Marion, 404 U.S. 307, 320	9
United States ex rel. Motely v. Rundle, 340 F.Supp. 807, 810-811 (E.D. Pa. 1972)	11

Other Authority

Antieau, Federal Civil Rights Acts § 29, at 49 (1971) ... 12

Statutes

28 U.S.C. § 1254(1) 2
42 U.S.C. §§ 1983, 1985 .....2, 3, 4, 10
Title 28, U.S.C. §§ 1331(a), 1343(3) 4

IN THE

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To the Chief Justice of the United States and the Associate Judges of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 18, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, appears as Appendix A of this petition. The unreported memorandum opinion and order of the United States District Court for the Northern District of Illinois appears as Appendix B of this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 18, 1974, affirming dismissal of petitioner's complaint. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

When a Civil Rights Act complaint for damages pursuant to 42 U.S.C. 1983 and 1985 alleges:

(1) that respondent states attorneys and police officers intentionally, maliciously, and purposefully withheld from the petitioner the fact that a crucial identification witness phoned police shortly after having identified petitioner at a line-up to state that she was not positive that petitioner was her husband's murderer;

(2) that pursuant to pre-trial discovery procedures, and upon defense request, respondents intentionally, maliciously and purposefully caused an altered supplemental police report omitting reference to said phone call to be turned over to the defense in place of the true supplemental police report which included five lines concerning said phone call;

(3) that petitioner spent 45 days in custody; and

(4) that, as a result of the aforesaid violations of his federally protected rights, petitioner "has sustained great mental anguish and distress, has suffered both in mind and in body, has been and will be deprived of income and property, and has been severely damaged in credit and reputation";

may a federal district court, taking the allegations of such complaint as true, dismiss the complaint for failure to state a claim upon which relief may be granted, merely because the falsification and suppression was discovered through an outside source during trial (after the state had rested), the true evidence was revealed to the jury, and acquittal ensued?

STATUTORY PROVISIONS

The statutes involved are:

Title 42 U.S.C. § 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42 U.S.C. § 1985. CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS—PREVENTING OFFICER FROM PERFORMING DUTIES.

* * * * *

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done,

any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

On November 3, 1972, petitioner filed a complaint in the Federal District Court. The jurisdiction of the District Court was invoked pursuant to the provisions of Title 28, U.S.C. § 1331(a) and § 1343(3), the complaint stating an action at law authorized by Title 42, U.S.C. § 1983 and § 1985.

Count I of petitioner's complaint alleged intentional, malicious, and purposeful withholding, suppression, and alteration of evidence favorable to the petitioner prior to and during a murder trial by certain named states attorneys.

Count II of petitioner's complaint alleged intentional, malicious, and purposeful withholding, suppression, and alteration of evidence favorable to the petitioner and prior to and during a murder trial by certain named police officers.

Count III of petitioner's complaint alleged a conspiracy between certain named states attorneys and certain named police officers to intentionally, maliciously, and purposely withhold, suppress, and alter evidence favorable to the petitioner prior to and during a murder trial.

Petitioner's complaint alleged that by reason of the acts of defendants, and as a direct and proximate result thereof, petitioner had sustained great mental anguish and distress, had suffered both in mind and in body, had been and would be deprived of income and property, and had been severely damaged in credit and reputation.

The complaint alleged that on November 6, 1970, one Saul Koppel, a store owner, had been shot and killed during an attempted robbery of his store. The incident was witnessed by Mrs. Saul Koppel as well as one other bystander.

Four months later, the petitioner was arrested and charged with the murder. At 6:05 p.m., on March 3, 1971, at the Sixth Area Headquarters of the Chicago Police Department, a line-up of five persons was held with Mrs. Saul Koppel, the widow of the murdered man, viewing the line-up. At said line-up, Mrs. Koppel tentatively identified the petitioner as the offender involved in the murder of her husband.

On the same day, at 7:45 p.m., approximately 45 minutes after leaving the Sixth Area Headquarters of the Chicago Police Department, Mrs. Saul Koppel telephoned Area Six Homicide and informed respondent Chicago Police Sergeant Joseph DiLeonardi that she wished to state at that time that she was not positive that the petitioner Donald C. Christman whom she viewed on March 3, 1971, at 6:05 p.m., was the same man that shot and killed her husband, Saul Koppel. Said phone call was entered on the Supplementary Report of the Chicago Police Department concerning the line-up of March 3, 1971.

The entry on the police report consisted of five lines and read as follows:

At 1945 hours, 3 March, 1971, Mrs. S. Koppel telephoned Area #6 Homicide and informed Sgt. J. DiLeonardi that she would like to state at this time that she is not positive that the man she viewed on 3 Mar. 71, at 1805 hours, is the same man that shot and killed her husband, Saul Koppel.

Petitioner was indicted by a Grand Jury of Cook County, Illinois, and a trial for murder was set before Judge Saul Epton, a Judge of the Circuit Court of Cook County. Petitioner was held in Cook County Jail for forty-five days before being released on bail.

Prior to the trial of petitioner for the murder of Saul Koppel, petitioner's defense attorney filed a motion demanding disclosure and production of all evidence in the possession and control of the People of the State of Illinois "wherein the evidence may be favorable to the defendant and material to the issue of guilt or punishment or could in any way weaken or affect any evidence proposed to be introduced against the defendant."

Respondent Edward V. Hanrahan, State's Attorney for Cook County, Illinois, through his assistants, respondents Anthony Corsentino and Marshall Weinberg, did transmit to petitioner's attorney a xeroxed copy of the supplementary report filed by the Chicago Police concerning the line-up held on March 3, 1971, but said report as turned over by the State's Attorney's office had been altered to delete all information concerning the phone call placed by Mrs. Saul Koppel on March 3, 1971 at 7:45 p.m.

The complaint alleged that respondents Anthony Corsentino and Marshall Weinberg, acting under the direction and control of the respondent Edward V. Hanrahan, had altered the supplementary report of the Chicago Police Department by deleting the information relating to said phone call. It was also alleged that respondent Joseph Dileonardi, who had received Mrs. Koppel's phone call and also signed the correct Supplementary Report as "supervisor approving," and William Miller, a police officer whose signature appeared as "reporting officer" on both the true and the altered supplementary report, had altered said report by deleting information relating to said phone call. Both the true and the altered supplementary reports were attached as exhibits to petitioner's complaint.

It was also alleged that all of the respondents had actual knowledge of the phone call and intentionally withheld and suppressed said evidence from petitioner and his attorney.

After three full days of trial and after the State had rested its case, defense counsel for the petitioner learned, through an

outside source, of Mrs. Koppel's phone call and the true police supplementary report. Confronted in Judge Epton's chambers, respondent Marshall Weinberg did admit prior knowledge of said phone call.

Information regarding said phone call was allowed to go to the jury, and, after a five day trial, the plaintiff was acquitted of all charges placed against him. The jury deliberated less than ten minutes.

The trial court granted a motion to dismiss petitioner's complaint due to the fact that petitioner had not stated a claim under the Civil Rights Act. (A copy of the written memorandum opinion and order is attached as Appendix B.)

Petitioner appealed to the U.S. Court of Appeals for the Seventh Circuit. On December 18, 1974, the Court issued a decision affirming the dismissal of petitioner's complaint, stating in part that the facts did not show an impairment of any federally protected right. (A copy of the written decision is attached as Appendix A.)

REASON FOR GRANTING THE WRIT

Certiorari should be allowed so that this court may decide whether intentional suppression and alteration of evidence in a state criminal trial is an actionable wrong under the Civil Rights Acts even where no conviction has resulted. This represents an important first impression question of federal law which has not been, but should be, settled by this Court.

Both the Court of Appeals and the District Court purport to distinguish the case at bar from *Brady* v. *Maryland*, 373 U.S. 83, in that no conviction resulted herein from the respondents' withholding and alteration of evidence favorable to the defense. In *Brady*, however, this Court was confronted with a conviction which could have been tainted by suppression of evidence favorable to the defense; accordingly, the conviction was reversed and

a new trial ordered. No question was then before the Court whether an actionable civil rights violation had occurred, and the Court properly ruled only on issues presented to the Court. The fact of acquittal may "cure" any *Brady* necessity for a new trial, but such acquittal does not preclude any action under the Civil Rights Act.

Both lower courts have confused an actionable civil rights violation with issues concerning damages and *Brady* rights to a new trial: finding no damage in the usual sense in the form of a wrongful conviction, they found no actionable violation. Merely because petitioner was acquitted, the Court of Appeals reasoned that "The delay (in disclosure of the favorable evidence), even though inexcusable, did not deprive the accused of due process of law." Moreover, that Court held that the facts did not disclose an impairment of petitioner's right to a fair trial, or the impairment of any other federally protected right.

Brady is a landmark case because it shifted emphasis from the prosecution to the defendant in ruling that due process was violated "irrespective of the good faith or bad faith of prosecution." That is, *Brady broadened* the scope of violations to include good faith errors by prosecution.

This changed emphasis has no pertinance to the present case since it is alleged that that the alterations and suppressions were intentional, malicious, and purposeful. In fact, prior to *Brady*, this Court ruled consistently that intentional and malicious suppression of evidence was violative of due process. In *Mooney* v. *Holohan*, 294 U.S. 103 (1934), this Court stated:

> It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistant with the rudimentary demands of justice as is the obtaining of a like result by intimidation. 294 U.S. at 112.

It should be noted that the acts of defendants in the present case do not leave any doubts concerning good faith—not only did defendants intentionally suppress, they altered documentary evidence and transmitted it to petitioner's counsel.

The type of damage petitioner suffered as a result of respondents' wrongful suppression and alteration of evidence is akin to the damage this Court has consistently recognized, over and above harmful prejudice through passage of time, in cases involving the right to speedy trial. This Court has stated that arrest (and by inference, trial) "may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States* v. *Marion*, 404 U.S. 307, 320.

In *Barker* v. *Wingo*, 407 U.S. 514, this Court stated:

> "(A) defendant confined to jail prior to trial is obviously disadvantaged by delay as is a defendant released on bail but unable to lead a normal life because of community suspicion and his own anxiety." 407 U.S. at 527.

See also *United States* v. *Ewell*, 383 U.S. 116, 120, recognizing that the guarantee of speedy trial is designed, among other things, "to minimize anxiety and concern accompanying public accusation . . ."; and *Smith* v. *Hooey*, 393 U.S. 374, 379, to the effect that such anxiety and concern can have a depressive effect even upon one incarcerated for another offense.

In *Klopfer* v. *North Carolina*, 386 U.S. 213, this Court stated:

> "The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." 386 U.S. at 222.

If such factors must be considered concerning rights to a speedy trial, likewise they should properly be considered when it is alleged that intentional suppression and alteration of evi-

dence subjected petitioner to the emotional stress of arrest, indictment, and trial without knowledge of such evidence.

Hilliard v. *Williams*, 465 F.2d 1212 (6th Cir. 1972), *cert. denied* United States Supreme Court, docket No. 72-339, November 20, 1972, establishes clear precedent that an action lies under 42 U.S.C. §§ 1983, 1985, and that the complaint should not be dismissed on motion. In *Hilliard, supra,* it was alleged in plaintiff's complaint that prosecution in a murder trial had sent an allegedly bloodstained jacket and some allegedly bloodstained curtains to the F.B.I. laboratory in Washington, D.C., for analysis, and that the F.B.I. report was negative as to human blood, or any blood, being on either the jacket or the curtains. It was further alleged that the district attorney general saw the F.B.I. report well in advance of the trial, was familiar with its contents, and did not divulge to Mrs. Hilliard or her attorney the F.B.I. report or make available the jacket and curtains to be introduced in evidence at the trial. It was further alleged that the district attorney general produced evidence before the jury to the effect that the spots on the jacket and curtains "looked like" or "appeared to be" bloodstains, in spite of the F.B.I. report that there were no bloodstains.

The United States Court of Appeals for the Sixth Circuit held that dismissal of the complaint under the Civil Rights Act was erroneous. This Court denied certiorari.

Furthermore, *Duncan* v. *Nelson*, 466 F. 2d 939 (7th Cir. 1972) held that a plaintiff must be permitted to establish damages under the Civil Rights Act due to the unlawful extraction of a confession even though a subsequent conviction and incarceration were too far removed from the anticipated scope of a defendant's misconduct to comprise an element of damages.

The Court of Appeals seeks to distinguish *Duncan* since it involved a violation of privilege against self-incrimination. The *Duncan* opinion, however, was based on concepts of fundamental fairness and due process rather than concern with any

specific constitutional violation since at the time the confession was obtained, this Court had not yet federalized the constitutional privilege against self-incrimination. *Duncan* stands for the proposition that one may recover civilly for violation of due process rights without regarding consequential damages flowing from wrongful conviction and post-trial incarceration.

Regardless of compensatory damages, petitioner is entitled to nominal damages "because the constitutional rights of a citizen are so valuable to him that an injury is presumed to flow from the deprivation itself." *United States ex rel. Motley* v. *Rundle*, 340 F. Supp. 807, 810-811 (E.D. Pa. 1972); *Basista* v. *Weir*, 340 F. 2d 74 (3rd Cir. 1965). Since respondents' acts were malicious, intentional, and purposeful, punitive damages would also be appropriate.

The concealment of the phone call could have prompted arrest or indictment, and, of prime importance, the knowledge that the phone call would be concealed could have induced the defendants to press for prosecution and trial. Knowledge of the phone call could have meant earlier release on bond, it could have produced a finding of "no probable cause" at the preliminary hearing, and it could have persuaded the grand jury not to indict. Legal fees may have been increased by respondents' concealment of the phone call. See *Kerr* v. *City of Chicago*, 424 F. 2d 1134, 1141 (7th Cir. 1970).

Any time that an individual goes on trial for murder, there is a possibility of conviction even though the defendant is innocent. Petitioner was subjected to the exposure of a miscarriage of justice and life imprisonment by the defendants' actions. He was forced to prepare for trial without vital evidence, and petitioner's counsel was forced to cross-examine prosecution witnesses without knowledge or use of crucial impeaching evidence. Petitioner was subjected to the extreme mental anxiety of being placed on trial for murder without knowledge or use of exculpatory information.

The reprehensible acts which are charged to the respondent state's attorneys and police officers indicate a malicious, willful, and intentional attempt by these individuals to obtain a conviction for murder in the courts of Illinois through illegal and unethical methods, and to imprison the petitioner for the remainder of his natural life.[1]

The foundation of justice in our legal system is a fair trial, which includes a right to due process of law and equal protection under the law. The actions of defendants represent a severe and grave challenge to the freedom of our citizens and to the effectiveness of our judicial system. Respondents exerted all of their efforts toward preventing the jury from hearing the evidence, and complete evidence was heard by the jury solely because of a fortuitous chain of events far removed from the actual trial process. Respondents' efforts were extended even to the point of tampering with evidence and falsifying police reports.

To hold that the time when the heinous acts are uncovered determines underlying liability is inconsistent with basic notions of justice; this would mean that, in certain cases, flagrant misuse of official power would be protected and official lawlessness would be condoned.

> "The purpose of this Section (42 U.S.C. 1983) has been said to be to provide a civil action to protect persons against misuse of power possessed by virtue of state law and made possible because the defendant was clothed with the authority of the state." *Antieau, Federal Civil Rights Acts* § 29, at 49 (1971).

This case presents facts which support a need for the protection afforded the Civil Rights Act. It is a first impression case in which unassailable evidence supports a conclusion that heinous acts were committed by State officials. The Civil Rights Act was

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1. Unfortunately, supplying defense with an altered, inaccurate police report is not an isolated occurrence in the system of criminal justice in Cook County, Illinois. For a recent documented example of such practices, see *People* v. *Toomin,* 18 Ill. App. 3d 824, 310 N.E. 2d 767 (1974).

enacted to protect our citizens from such acts, and it is urged that this Court grant certiorari in order to reverse the lower courts and prevent the establishment of a terrifying new precedent by the Court of Appeals.

CONCLUSION

The decision of the Court below is inconsistent with our system of justice and is contrary to the meaning, spirit, and intent of the Civil Rights Act. This first impression case presents consititutional questions of great impact and importance, and such questions should be decided by this Honorable Court after full briefings and argument.

For the reasons set out above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1973—January Session, 1974

No. 73-1414

DONALD C. CHRISTMAN,
Plaintiff-Appellant,

vs.

EDWARD V. HANRAHAN, ANTHONY CORSETINO, MARSHALL WEINBERG, WILLIAM MILLER and JOSEPH DILEONARDI,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 2789

JAMES B. PARSONS,
Judge.

Argued February 20, 1974—Decided July 18, 1974

Before CUMMINGS and STEVENS, *Circuit Judges,* and GRANT, *Senior District Judge.**

STEVENS, *Circuit Judge.* Evidence favorable to the accused was temporarily suppressed by the prosecution; before the trial ended, however, the evidence was revealed to the court and jury and an acquittal promptly ensued. The question presented on this appeal is whether the abortive misconduct by the prose-

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

cution gives rise to an action for damages under 42 U.S.C. § 1983. We hold that the district court properly sustained a motion to dismiss the complaint.

The complaint alleges that a storekeeper named Koppel was killed during an attempted robbery on November 6, 1970; the incident was witnessed by the victim's wife and also by a bystander. Four months later the plaintiff was arrested and charged with murder; at a police lineup Mrs. Koppel tentatively identified plaintiff as the killer. After leaving the station, however, she telephoned a police sergeant to state that she was not positive that plaintiff was the man who had shot her husband; this information was entered on a supplemental police report.

On April 10, 1971, plaintiff's trial on the murder charge commenced. After three days of trial, his attorney first learned of Mrs. Koppel's telephone call expressing doubt about her identification of plaintiff. The complaint alleges that, pursuant to a discovery motion, the police report had been produced in advance of trial, but that it had been deliberately altered to omit any reference to Mrs. Koppel's telephone call. Both the police and the prosecution are charged with complicity in the alteration and in the deliberate suppression of evidence.

When defense counsel learned of the theretofore concealed telephone call, the matter was brought to the attention of the court and the jury. It is fair to infer from the complaint that not only the call itself, but also the attempt to suppress information tending to impeach Mrs. Koppel's testimony, constituted evidence favorable to the defense. For after only 10 minutes of deliberation, the jury returned a verdict of not guilty.

The defendants in this action include both the police officers and the prosecutors who were responsible for the alleged suppression of evidence. For purposes of our decision we, of course, accept the allegations as true and therefore start from the premise that defendants were guilty of serious misconduct. It does not necessarily follow that plaintiff was deprived of his constitutional right to a fair trial.

If evidence concerning the telephone call had been suppressed until after the trial was concluded, and if the jury had returned a guilty verdict, unquestionably plaintiff would have been deprived of his liberty without due process of law. *Brady* v. *Maryland*, 373 U.S. 83, 86-88. But plaintiff was not found guilty and the relevant evidence was brought out during the course of the trial. Therefore, even though we certainly do not condone the defendants' egregious misconduct, the trial itself, viewed as an entirety, was not fundamentally unfair.

In order to determine whether the complaint has alleged a deprivation of a federally protected right, it is necessary to identify the precise right that plaintiff seeks to vindicate. Two quite different theories must be considered. On the one hand, we might say that an accused person has a federal right to immediate disclosure, upon request, of material evidence favorable to his defense; any temporary failure to honor such a request, even if totally harmless, would violate that right. On the other hand, we might define the federal right at stake as the right to a fair trial and not regard the temporary withholding as of federal significance—regardless of its consequences as a basis for discipline as a matter of state law—unless it tainted the fairness of the criminal trial viewed as a whole.

Under the former view, the Due Process Clause would provide broad generalized protection against misdeeds by the police or prosecution; under the latter view, the mission of the clause would be avoidance of an unfair trial to the accused, and no violation would result unless the misconduct had some prejudicial impact on the defense.

As we read *Brady* v. *Maryland, supra*, the Court has directed us to take the latter view. The relevant issue in that case was whether the Due Process Clause was violated by the suppression of material evidence favorable to the accused notwithstanding the good faith of the prosecution. The Court held that it was, stressing the paramount importance of the fairness of the trial as contrasted with the lesser significance of punishing the misdeeds of the prosecutor.

In his explanation of "what nondisclosure by a prosecutor violates due process," Mr. Justice Douglas, writing for the Court, first quoted from the seminal decision of *Mooney* v. *Holohan*:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

294 U.S. 103, 112, quoted in 373 U.S. at 86.

After reviewing later cases in which it is fair to state that the entire proceedings were fundamentally unfair,[1] the Court stated its *Brady* holding in these terms:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> "The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

373 U.S. at 87.

Although the final reference to any unfair treatment of an accused lends support to appellant's theory, the opinion as a whole, we believe, requires an appraisal of the fairness of the complete trial. The controlling principle is not punishment of society for the prosecutor's misdeed "but avoidance of an unfair trial to the

1. *Pyle* v. *Kansas*, 317 U.S. 213; *Napue* v. *Illinois*, 360 U.S. 264; *Alcorta* v. *Texas*, 335 U.S. 28; *Wilde* v. *Wyoming*, 362 U.S. 607.

accused." The *Brady* holding is expressly applicable only "where the evidence is material." If the *Brady* rule had been primarily intended to deter prosecutorial misconduct, rather than to insure fair trials, the materiality limitation would have been unnecessary. As the Court's recent opinion in *Moore* v. *Illinois*, 408 U.S. 786, demonstrates, however, this limitation is of critical importance. For in that case there was almost no discussion of the need to deter prosecutorial misconduct; on the contrary, the careful and detailed analysis of the evidence was directed entirely to establishing a lack of materiality.

In this case, the defect in the trial proceedings related entirely to the timing of the disclosure of the information concerning Mrs. Koppel's telephone call. We may assume that the information was material as tending to impeach an important witness. Plaintiff and his counsel were therefore entitled to earlier access to that information; nevertheless, it is manifest that the timing of the disclosure did not prejudice the defense.[2] The delay, even though inexcusable, did not deprive the accused of due process of law.

Duncan v. *Nelson*, 466 F.2d 939 (7th Cir. 1972), which involved an unconstitutionally obtained confession, is consistent with our conclusion. Although the court held that a damage recovery could not be predicated on the use of the confession at trial (which led to an invalid conviction and incarceration), the plaintiff in *Duncan* was given an opportunity to prove that he suffered mental anguish and possible physical harm during the unlawful interrogation itself.[3] *Duncan* involved a violation of the con-

2. Although we think the timing of the disclosure probably benefited the defense by highlighting the prosecutorial misconduct, we do not rely on that assumption. The acquittal after only 10 minutes of deliberation does establish, however, that the delayed disclosure was not prejudicial. In this case, therefore, we have no occasion to consider either (1) whether a delayed disclosure might be sufficiently prejudicial to deprive an accused of a fair trial notwithstanding his acquittal, or (2) whether, if a conviction ensues, a delay might nevertheless be harmless because the disclosure was made in time to avoid any significant risk of prejudice.

3. "Although physical violence would ordinarily make damages greater and more easily ascertainable, we see no reason in either logic or experience to require the presence of physical violence as a

stitutional privilege against self-incrimination rather than a violation of the right to a fair trial. Duncan's cause of action arose before his criminal trial had even started. In this case, however, our holding that the wrongful conduct of the police and prosecution had no impact on plaintiff's federally protected right to a fair trial disposes of his claim.

We therefore hold that the failure to allege any facts disclosing an impairment of plaintiff's right to a fair trial, or the impairment of any other federally protected right, is fatal to plaintiff's § 1983 claim.

AFFIRMED.

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necessary prerequisite to suit under § 1983. Moreover, there has been no finding by any court which would preclude plaintiff from his proof on the issue of physical violence. The Illinois Supreme Court simply found the confession involuntary absent the allegations of violence, and did not find it necessary to reach the issue of physical violence.

"Accordingly, the order of dismissal is reversed and the cause remanded for trial in accordance with our conclusion that while the plaintiff may not recover damages for his conviction and incarceration, he should be afforded an opportunity to present his proof concerning any harm which he allegedly suffered and which these defendants knew or should have known plaintiff would suffer as a result of the unlawful interrogation and confession." 466 F.2d at 945.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

* * (Caption—Civil Action No. 72 C 2789) * *

MEMORANDUM OPINION AND ORDER

The defendants Hanrahan, Corsentino and Weinberg, by their attorney, have come before me today on a motion to dismiss plaintiff Christman's complaint against them upon the ground that the complaint fails to state a claim upon which relief can be granted.

The facts, as alleged in the complaint, which must be taken as true for the purposes of this motion, are as follows. During the course of an attempted robbery, Saul Koppel was shot to death in front of his store by an unknown assailant. The murder was witnessed by the victim's wife, Mrs. Evelyn Koppel, and by a bystander Mr. William Ragsdale.

Several months later plaintiff Christman was arrested and charged with the murder of Saul Koppel. Later that day, after viewing a police lineup, Mrs. Koppel identified plaintiff as the man who shot her husband. A short time later, she telephoned defendant Police Sergeant Joseph DiLeonardi and told him that she was not positive that the man she identified at the lineup was the same man who murdered her husband. This telephone call was entered on the Supplementary Report of the Chicago Police Department.

Christman was indicted by a Grand Jury of Cook County, Illinois and his trial was set before Judge Saul Epton of the Circuit Court of Cook County.

Plaintiff's attorney filed a discovery motion to compel the State to disclose evidence which "might be favorable to the de-

fendant and material to the issue of guilt or punishment or which would in any way weaken or affect any evidence proposed to be introduced against the defendant." Accordingly, plaintiff's attorney was provided with a copy of the Supplementary Report concerning the lineup held on March 3, 1971. However, the information concerning the telephone call placed by Mrs. Koppel, according to the allegations of the complaint, had been intentionally deleted from the Report.

After three days of trial, Christman's attorney learned of Mrs. Koppel's telephone call and brought it to the attention of the judge. By way of cure, Sergeant DiLeonardi was called as the court's witness and was examined and cross-examined before the jury regarding both Mrs. Koppel's testimony and her lineup identification.

The jury deliberated less than ten minutes and returned a verdict of not guilty.

Plaintiff Christman now complains in this Court that the willful suppression of favorable and material evidence by the defendants, under color of law and under color of their authority as State's Attorney and Assistant State's Attorneys of Cook County, Illinois, deprived him of rights, privileges and immunities secured to him by the Constitution and laws of the United States.

Therefore, the question before me today is whether the intentional suppression of favorable and material evidence which after the State had rested its case, was discovered by Christman's attorney but which evidence was nevertheless brought before the jury before the trial was completed amounts to a violation of the Due Process Clause of the Fifth and Fourteenth Amendments, and particularly, where the trial resulted in an acquittal. If this issue is resolved in favor of the plaintiff, there still remains the question of whether such a violation may be actionable under Title 42, United States Code; Sections 1983 and 1985(3).

In substance, the plaintiff alleges a violation of the *Brady* v. *Maryland,* 373 U.S. 83 (1963), ruling:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due Process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady, supra* at 87.

Therefore, it is clear that a prosecutor violates the constitutional requirements of due process of law when Brady evidence is not disclosed to the defendant.

However, *Brady* v. *Maryland,* is obviously distinguishable from this case presently before me. The major thrust of the *Brady* ruling required that evidence favorable to the accused be presented to the jury. With all the admissible evidence before the jury it can then reach the fairest decision as to an accused's guilt or innocence. In *Brady* the favorable evidence did not reach the jury at all. In the present case, Judge Epton, once the favorable evidence came to light, caused it to be fully disclosed to the jury. The fact of the matter is, by bringing this portion of the evidence before the jury after the State had rested its case, that the court caused it to be given a more prominent place than it would have attained had it been admitted during the regular course of trial. The fact that this favorable evidence was presented to the jury in the case before me, whereas in *Brady* it was not, is a clear dividing line.

There is another distinction. *Brady* was convicted; the plaintiff Christman was acquitted by the jury after it had deliberated *for only ten minutes.*

If " 'Due Process' is a law which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial," *Sexton* v. *Barry,* 233 F.2d 220, 224, then the jury vindicated plaintiff's rights and its essential purpose was accomplished.

I could not and will not condone that reprehensible acts alleged in plaintiff's complaint. Such acts have been severely condemned by the American and Illinois Bar Associations:

> "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." DR 7-103(B), *A.B.A. Code of Professional Responsibility.*

The Illinois Bar Association also has adopted the same provision in its Code of Professional Responsibility. These Bar Associations also provide effective enforcement mechanisms.

Considering all the foregoing, I hold that the plaintiff's complaint should be dismissed because the plaintiff has not stated a claim under Title 42, U.S.C., Sections 1983 and 1985, upon which appropriately I am able to grant relief. It is so ordered, adjudged and decreed.

Even though only three of the five defendants moved to dismiss the complaint, my action here in dismissing the complaint for the reasons given necessarily inures to the benefit of all defendants.

ENTER:

/s/ JAMES B. PARSONS
United States District Judge

Date: February 27, 1973